NO. 75800-0

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: THE PERSONAL RESTRAINT PETITION OF RONALD HALL, PETITIONER

Appeal from the Superior Court of Pierce County
The Honorable Judge Bruce Cohoe

No. 96-1-00042-8

~~RESPONSE BRIEF~~ ANSWER TO AMICUS

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A. INTRODUCTION.

The history of this case is adequately detailed in the parties' briefing. In this Court's October 17, 2006 order, it directed the parties to file supplemental briefs to "address the following issue: whether entry of the exceptional sentence in this case, based on findings made by the trial court rather than a jury, can be considered harmless error." Petitioner and respondent have filed briefs. The Washington Association of Criminal Defense Lawyers has also filed an amicus curiae brief.

B. ARGUMENTS MADE FOR THE FIRST TIME IN A SUPPLEMENTAL BRIEF ARE NOT PROPERLY CONSIDERED BY THIS COURT.

In his original personal restraint petition, petitioner argued that his sentence was unlawful pursuant to Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), that Blakely applied to his case because it was not final on the day that that case was published, that his petition was not impermissibly successive, and that his sentence was not subject to a harmless error analysis. Petitioner did not make a state constitutional claim, nor the appropriate Gunwall analysis. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

In its response to the petition, the State conceded that the petition was not time barred, and that it was not impermissibly successive. The State, however asserted that the petition must be dismissed because any

error was harmless. Petitioner filed a reply brief in which he argued that RCW 9.94A.535(2) (the exceptional sentence provision of the Sentencing Reform Act) was facially invalid, that harmless error analysis was not permitted, and he must be re-sentenced within the standard range.

Now, in his supplemental brief to this Court, petitioner asserts that (1) he cannot be convicted of a non-existent crime, (2) the State failed to charge the basis for the exceptional sentence, (3) harmless error analysis is impossible under the Washington Constitution, and (4) this Court cannot determine whether the failure to instruct on the elements of deliberate cruelty and multiple injuries was harmless when he had no notice of the aggravating factors.

This Court did not authorize that this petition be redrafted and resubmitted to include any and all possible claims. It specifically did not request briefing on the applicability of the Washington Constitution, nor other potential legal theories. It asked only for supplemental briefing on "whether entry of the exceptional sentence in this case, based on findings made by the trial court rather than a jury, can be considered harmless error." It is well settled that new issues cannot be raised in supplemental briefs.

"[T]his court will not address an argument 'raised for the first time in a supplemental brief and not made originally by the petitioner or

respondent within the petition for review or the response to petition.'" Sorenson v. Pyeatt, 158 Wn.2d 523, 543 146 P.3d 1172 (2006) (quoting Cummins v. Lewis County, 156 Wn.2d 844, 851, 133 P.3d 458 (2006) (citing Douglas v. Freeman, 117 Wn.2d 242, 258, 814 P.2d 1160 (1991)); RAP 13.7(b)).

The same rule applies when this Court reviews supplemental briefing with a new state constitutional claim.

> Turning briefly to the Defendant's supplemental brief, Hudson raises a state constitutional claim. It is supported by the appropriate Gunwall factors. See State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808, 76 A.L.R.4th 517 (1986). Nevertheless, Hudson's failure to employ this argument until his supplemental brief precludes us from addressing his state constitutional claim. State v. Clark, 124 Wn.2d 90, 875 P.2d 613 (1994); State v. Wethered, 110 Wn.2d 466, 755 P.2d 797 (1988). To allow Hudson to engage in a full Gunwall analysis so late in the appeal would encourage parties to save their state constitutional claims for the reply brief and would lead to unbalanced and incomplete development of the issues for review. See Wood v. Postelthwaite, 82 Wn.2d 387, 389, 510 P.2d 1109 (1973) ("To allow the petitioner to raise issues not addressed in his petition would be an injustice to the party opposing the petition and inconsistent with the rules on appeal."); see also RAP 10.3(c) (reply brief should be limited to a response to the issues in the brief); RAP 13.7(b) (generally, the Supreme Court will review only the questions raised in the petition for review and the answer). This concern is particularly relevant here as demonstrated by the fact that the State, being unaware of Hudson's state constitutional claim, never engaged in state constitutional analysis in its briefing. We decline to address Hudson's state constitutional claim for these reasons.

State v. Hudson, 124 Wn.2d 107, 120, 874 P.2d 160 (1994)(citations omitted).

The only question for this Court is whether the exceptional sentence imposed was harmless in light of the trial testimony and exhibits. This Court has already determined that harmless error analysis is appropriate when Blakely error occurs. See State v. Suleiman, 158 Wn.2d 280, 295, 143 P.3d 795 (2006) (case remanded to the Court of Appeals for consideration of whether the Blakely error was harmless). It is interesting to note that petitioner never challenges the obvious result if this Court does engage in that analysis. There can be no question that the defendant exhibited deliberate cruelty and inflicted multiple injuries.

C. ARGUMENTS MADE FOR THE FIRST TIME IN AN AMICUS CURIAE BRIEF ARE NOT PROPERLY CONSIDERED BY THIS COURT.

Like the issues raised by petitioner in his supplemental brief, the issues raised by the amicus brief are new and should not be considered by this court.

> "We have many times held that questions which are not raised in any manner before the trial court will not be considered on appeal. This general rule is, likewise, ordinarily applicable to defenses and objections based on constitutional grounds."

> It is further well established that appellate courts will not enter into the discussion of points raised only by amici curiae.

Long v. Odell, 60 Wn.2d 151, 153-154, 372 P.2d 548 (1962) (citations omitted); State v. Clark, 124 Wn.2d 90, 101, 875 P.2d 613 (1994) (overruled on other grounds by State v. Catlett, 133 Wn.2d 355, 945 P.2d 700 (1997)). "Ordinarily, we do not review issues raised solely by amicus curiae." City of Bellevue v. Lorang, 140 Wn.2d 19, 34, 992 P.2d 496 (2000) (citations omitted).

The issues and arguments raised in the Brief of Amicus Curiae, filed by the Washington Association of Criminal Defense Lawyers, are solely based on state constitutional grounds and were not raised in the original petition. As noted above, it is improper to raise new state constitutional arguments after the filing of the opening and response briefs. These issues are therefore not properly before this Court.

D. CONCLUSION.

Petitioner has failed to demonstrate the Blakely error was not harmless. The issues raised in petitioner's supplemental brief and the amicus curiae should not be considered by this Court because they were not raised in the original petition. The petition should be dismissed.

DATED: February 28th, 2007.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Griffith

2-27-07 Theresa
Date Signature